RECORD AND BRIEFS

No. 15-577

In The
Supreme Court of the United States

TRINITY LUTHERAN CHURCH
OF COLUMBIA, INC.,

Petitioner,

v.

SARA PARKER PAULEY,
IN HER OFFICIAL CAPACITY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Institute for Justice files this brief on its own behalf as amicus curiae. The Institute is a public interest law firm based in Arlington, Virginia; it is a non-partisan, non-profit organization that represents its clients pro bono. The Institute litigates cases in four areas: private property rights, economic liberty, freedom of speech, and school choice.

As part of its school-choice practice, the Institute often represents, as intervenor-defendants, parents who wish to use scholarships and other forms of aid made available through school-choice programs when those programs are challenged in court. The Institute has twice represented such parents before this Court, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125 (2011). The Institute, moreover, currently represents the parents petitioning for certiorari in *Doyle v. Taxpayers for Public Education*, No. 15-556 – a petition this Court appears to be holding pending resolution of the present case.

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[1] No counsel for any party authored this brief in whole or part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Institute for Justice made such a monetary contribution. Counsel for the petitioner provided blanket consent to the filing of amicus curiae briefs. Counsel for the respondent provided the Institute with written consent, which is on file with the Court.

The Institute has also defended school-choice programs on behalf of parents in some 22 other cases. In most of them, as in *Doyle*, the plaintiffs challenging the programs have argued that, because the programs include religious options, they violate state constitutional provisions similar to Article I, section 7, of the Missouri Constitution – the provision upon which Missouri relied to exclude Trinity Lutheran from its playground resurfacing program. In such cases, the Institute argues that applying these state "Blaine Amendments" to invalidate school-choice programs violates the federal Constitution. In five other cases, moreover, the Institute has brought federal constitutional challenges on behalf of parents when states have taken it upon themselves to exclude religious options.

Like Trinity Lutheran, the Institute does not believe that Blaine Amendments and other state constitutional provisions should be permitted to bar religion from public-benefit programs, and it therefore files this brief in support of Trinity Lutheran. But it also submits this brief to address an important *distinction* between the present case and those it litigates, including *Doyle*: the "consistent distinction" that this Court has drawn between (1) public-benefit programs that provide aid to *institutions*, such as the playground resurfacing program in this case, and (2) public-benefit programs that provide aid to *individuals*, such as the school-choice program in *Doyle*. *Zelman*, 536 U.S. at 649. This Court has been more protective of religion in the latter context, where "the

link between government funds and religious training is broken by the independent and private choice" of students and their parents. *Locke v. Davey*, 540 U.S. 712, 719 (2004).

Thus, regardless of whether this Court allows states to bar churches from the type of institutional-aid program at issue in this case, it should make clear, in this case or *Doyle*, that states may not bar religious options from *individual*-aid programs. Denying a child the option of a religious school when her parents believe that is the best option for her does not merely deprive the child of educational opportunity – it violates the federal Constitution.

SUMMARY OF THE ARGUMENT

The question presented in this case – whether a church may be excluded from an otherwise generally available playground resurfacing program – is one with far-reaching implications. The Court's answer to the question could bear on the federal constitutional rights of the 1.3 million students currently participating in school-choice programs throughout the country.

School-choice programs, which provide aid to families in order to empower them to choose the schools that are best for their children, are commonly challenged by those who argue that such programs must exclude religious options. Of course, since *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), it has been clear that the federal Constitution *allows*

religious options in these programs. Nevertheless, school-choice opponents maintain that *state* constitutional provisions, including "Blaine Amendments" like the one at issue in this case, prohibit religious options and that, under the federal Constitution, states are perfectly free to prohibit them.

Thus, the relevance of this case to school choice: if this Court holds that religious-based exclusions in public-benefit programs violate the federal Constitution, it will put the argument of school-choice opponents to rest, and school-choice families will be able to continue accessing the educational options, religious or not, that are best for their children. And that should be the holding in this case, for the Religion Clauses of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment, demand neutrality – not hostility – toward religion.

If, however, this Court upholds the religion-based exclusion in this case, then it should rule narrowly, addressing only the playground resurfacing program at issue or, at most, public-benefit programs that provide aid to *institutions*. It should, moreover, make clear that states may *not* exclude religious options from public-benefit programs that, like school-choice programs, provide aid to *individuals*, *i.e.*, students. It should do so for four reasons.

First, this Court's Religion Clause jurisprudence has drawn a "consistent distinction" between programs that provide aid to institutions and those that provide aid to individuals, who in turn decide where

to use that aid. *Id.* at 649. It has been more protective of religion in the individual-aid context, where "the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke v. Davey*, 540 U.S. 712, 719 (2004).

Second, the "Blaine Amendments" and other state constitutional provisions upon which school-choice opponents rely in attempting to expel religious options were not designed to reach programs that provide aid to individual students. Rather, they were concerned with public funding of certain religious institutions.

Third, in the case of Blaine Amendments specifically, there is a history and object of anti-religious animus that should not be used to deny parental choice in education today. These provisions were "born of bigotry" and "pervasive hostility to the Catholic Church," *Mitchell v. Helms*, 530 U.S. 793, 828, 829 (2000) (plurality), and this Court should not allow engines of animus toward Catholics to be transmogrified into engines of animus against all religion.

Finally, this Court's opinion in *Locke v. Davey* does not, as some courts hold, sanction the exclusion of religious options from school-choice programs. As the Tenth Circuit has correctly noted, *Locke* simply does not authorize "the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008).

Accordingly, if this Court upholds the exclusion of churches from Missouri's playground resurfacing program, it should make clear in its opinion that such exclusions will not be tolerated in the individual-aid context. Alternatively, the Court should reserve judgment on the individual-aid question and grant certiorari in *Doyle v. Taxpayers for Public Education*, No. 15-556, which squarely presents that question, to resolve it.

ARGUMENT

I. Barring Religion From Public-Benefit Programs Has Implications Far Beyond Scrap Tires For Church Playgrounds, And This Court Should Not Allow It

Whether religion-based exclusions in public-benefit programs are constitutional is a question whose answer has implications far beyond scrap tires and church playgrounds. Its answer is perhaps most pressing for the more than one million kindergarten-through-twelfth-grade students currently participating in school-choice programs that empower parents to choose the schools that are best for their children.

As of the submission of this brief, approximately 1.3 million students at the K-12 level were participating in such programs. They include approximately 167,950 students in publicly-funded scholarship, or "voucher," programs; 226,000 students in tax-credit-generated scholarship programs; 6,850 students in

publicly-funded education savings account programs; and 911,610 students whose parents receive individual tax credits or deductions to help offset the cost of private schooling. *Fast Facts*, EdChoice.org, http://www.edchoice.org/our-resources/fast-facts/ (last visited April 16, 2016).

These programs, moreover, are on the books in every corner of the country. There are now publicly-funded scholarship programs in fifteen states[2] and the District of Columbia; tax-credit-generated scholarship programs in seventeen states;[3] education savings account programs in five states;[4] and individual tax credit/deduction programs in eight states.[5] *Id.* All told, there are now 61 school-choice programs in thirty states and the nation's capital.[6]

When such programs are adopted, they are frequently challenged by those who insist religious options must be excluded from public-benefit programs. School-choice families, in turn, are subjected to years

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[2] Arkansas, Colorado, Florida, Georgia, Indiana, Louisiana, Maine, Maryland, Mississippi, North Carolina, Ohio, Oklahoma, Utah, Vermont, and Wisconsin.

[3] Alabama, Arizona, Florida, Georgia, Indiana, Iowa, Kansas, Louisiana, Montana, New Hampshire, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Virginia.

[4] Arizona, Florida, Mississippi, Nevada, and Tennessee.

[5] Alabama, Illinois, Indiana, Iowa, Louisiana, Minnesota, South Carolina, and Wisconsin.

[6] Some states have multiple types of programs.

of uncertainty, knowing that, at any moment, a court might halt the program in which they are participating, forcing them to foot a bill they cannot afford or return their children to public schools that were not meeting their needs in the first place.

Since *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), those who bring these lawsuits have no federal leg on which to stand. *Zelman* held that the Establishment Clause *allows* religious schools to participate in school-choice programs, so long as the programs are neutral with respect to religion – meaning religious and non-religious schools alike are free to participate – and so long as parents, rather than government, select the schools their children attend. *Id.* at 653, 662-63.

Undeterred, school-choice opponents have continued to rely on *state* constitutions – especially, but not exclusively, on the "Blaine Amendments" found in many state constitutions. They argue that even though the Establishment Clause allows religious options, states are still free to bar them. Sadly, some courts have agreed, concluding that it is perfectly permissible under the federal Constitution to single out and exclude religious options from otherwise generally available school-choice programs.

One such case is *Doyle v. Taxpayers for Public Education*, No. 15-556, which is currently pending in this Court on a petition for writ of certiorari. *See Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 473-75 (Colo. 2015) (plurality)

(invalidating scholarship program because it included religious options and concluding that doing so did not violate federal Constitution). Sadly, it is not the only one. *See Eulitt ex rel. Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 356-57 (1st Cir. 2004) (holding exclusion of religious options from scholarship program did not violate federal Constitution); *Anderson v. Town of Durham*, 895 A.2d 944, 959-61 (Me. 2006) (same); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 563-64 (Vt. 1999) (same).

Thus, the question presented in this case – whether the federal Constitution tolerates a state's exclusion of churches from an otherwise generally available public-benefit program – takes on particular significance for the rapidly growing number of school-choice families. The Court's resolution of that question could affect the freedom of these families to choose a religious school if they believe it to be the best educational option for their child. It could also affect the ability of lawmakers to use school-choice programs as a policy tool to provide parents with the widest array of educational options.

If this Court concludes that religion-based exclusions in public-benefit programs are inconsistent with the federal Constitution, then the families participating in school-choice programs will be able to rest securely, knowing they will continue to have access to the schools that best serve their children. And that *should* be the resolution of this case.

This Court, after all, held, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), that government may not single out religion for unfavorable treatment unless it has a "compelling governmental interest" for doing so and acts in a way that is "narrowly tailored to advance that interest." *Id.* at 531-32. Missouri has no such interest. Allowing churches to participate in the playground resurfacing program is plainly permissible under the Establishment Clause, *see Mitchell v. Helms*, 530 U.S. 793 (2000), and Missouri therefore cannot claim a compelling interest in avoiding an Establishment Clause violation.

A "state interest . . . in achieving *greater* separation of church and State than is already ensured under the Establishment Clause," moreover, is not a compelling governmental interest. *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). In fact, in *Widmar*, Missouri relied on the very Blaine Amendment it relies on here to try to justify excluding religious organizations from using otherwise-available state university facilities for religious worship. *Id.* at 275 & n.17. This Court held the exclusion unconstitutional under the Free Speech Clause, explaining that "[i]n this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech." *Id.* Similarly, in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court concluded that a state university did not have a compelling governmental interest in

excluding a religious organization from using otherwise available student-activity funds for religious activities. *Id.* at 845-46.

Finally, this Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), does not give Missouri the constitutional license the state claims it does. As *Locke* stressed, "the only [governmental] interest at issue" in that case was "the State's interest in not funding the religious training of clergy," *id.* at 722 n.5 – an interest not at issue in a program concerning playground resurfacing. Moreover, the public-benefit program at issue in *Locke* went "a long way toward *including* religion in its benefits." *Id.* at 724 (emphasis added). Missouri, on the other hand, has effected a wholesale exclusion of religion, and *Locke* simply does not authorize "the wholesale exclusion of religious institutions . . . from otherwise neutral and generally available government support." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008).

II. If, However, This Court Concludes That Churches May Be Barred From The Playground Resurfacing Program, Then It Should Clarify – In This Case Or *Doyle* – That Religious Options May Not Be Barred From School-Choice Programs

If, however, this Court *allows* the religion-based exclusion in this case, then the Court's opinion – depending on its breadth – could severely hamstring the nation's many thriving school-choice programs and the opportunities they provide. Accordingly, if this

Court upholds the exclusion, it should rule narrowly, addressing only the playground resurfacing grant program at issue or, at most, public-benefit programs that provide aid to *institutions*. It should, moreover, make clear – in this case or in *Doyle*, where the issue is squarely presented – that states may *not* exclude religious options from public-benefit programs that, like school-choice programs, provide aid to *individuals*, *i.e.*, students.

The Court should take this course for four reasons. First, this Court's Establishment Clause jurisprudence has drawn a "consistent distinction" between programs that provide aid to institutions and those that provide aid to individuals, who in turn decide where to use that aid, *Zelman*, 536 U.S. at 649, and it has been more protective of religion in the latter context, where "the link between government funds and religious training is broken by the independent and private choice of recipients," *Locke*, 540 U.S. at 719. Second, the "Blaine Amendments" and other state constitutional provisions upon which opponents of school-choice programs rely in attempting to expel religious options from the programs were not designed to reach aid to individual students; they were designed to reach public funding of certain religious institutions. Third, in the case of Blaine Amendments specifically, there is a history and object of anti-religious animus that this Court should not allow to be used to deny parental choice in education. And fourth, this Court's decision in *Locke* does not authorize the wholesale exclusion of religious options

from school-choice programs, as some courts have concluded it does.

A. This Court Has Drawn A "Consistent Distinction" Between Public-Benefit Programs That Aid Institutions And Those That Aid Individuals

This Court has drawn what it has called a "consistent distinction" between institutional- and individual-aid programs – *i.e.*, "between [1] government programs that provide aid directly to religious schools and [2] programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." *Zelman*, 536 U.S. at 649 (citations omitted). Although the Court has drawn this distinction in cases concerning the permissibility of *including* religious options in school-choice and similar individual-aid programs, it bears on the permissibility of *excluding* religious options from such programs, as well.

1. The Court Has Consistently Held That Individual-Aid Programs Can Include Religious Options So Long As They Are Neutral And Operate On Private Choice

In *Zelman*, this Court noted that although its "jurisprudence with respect to the constitutionality of direct [institutional] aid programs has 'changed

significantly' over the past two decades," its "jurisprudence with respect to true private choice programs has remained consistent and unbroken." *Id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 236 (1997)). This jurisprudence, which began to develop in *Mueller v. Allen*, 463 U.S. 388 (1983), and culminated in *Zelman* itself, makes clear that, so long as a public-benefit program is neutral toward religion – meaning religious *and* non-religious schools or institutions are free to participate – the private choice of "*individuals*, who, in turn, direct the aid to religious schools or institutions of their own choosing," breaks any connection between church and state. *Zelman*, 536 U.S. at 649 (emphasis added).

In *Mueller*, for example, the Court upheld, under the Establishment Clause, a program that provided tax deductions for educational expenses, including tuition at private religious or non-religious schools. *Mueller*, 463 U.S. at 390-91. It was of no moment that 96 percent of the program's beneficiaries were parents of children attending religious schools, because the program "neutrally provide[d] state assistance to a broad spectrum of citizens," and any "financial benefits flowing to [such] schools" did so "only as a result of numerous, private choices of individual parents of school-age children." *Id.* at 398-99. "Where . . . aid to [religious] schools is available only as a result of decisions of individual parents," the Court concluded, "no 'imprimatur of State approval' can be deemed to have been conferred on any particular religion, or on

religion generally." *Id.* at 399 (citation omitted) (quoting *Widmar*, 454 U.S. at 274).

The Court reiterated this principle several times in subsequent cases. In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), for example, it held that the Establishment Clause did not bar religious colleges and universities from participating in a state-funded scholarship program, because the aid was "neutrally available" and "[a]ny aid . . . that ultimately flow[ed] to religious institutions d[id] so only as a result of the genuinely independent and private choices of aid recipients." *Id.* at 488, 489. Similarly, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), it rejected an Establishment Clause challenge to the provision of federally-funded special education services to children in private schools, religious and non-religious, because the program "distribute[d] benefits neutrally to any child qualifying as 'disabled'" and "accord[ed] parents freedom to select a school of their choice." *Id.* at 10.

The *Mueller/Witters/Zobrest* approach culminated in *Zelman*, which concerned a scholarship program for elementary and secondary students substantially identical to that at issue in *Doyle*. The Court began its analysis by reviewing its earlier individual-aid cases and summarizing their common thread – neutrality and private choice:

> *Mueller*, *Witters*, and *Zobrest* . . . make clear that where a government aid program is

> neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

Zelman, 536 U.S. at 652. Because the scholarship program before it shared these characteristics, the Court upheld the program, notwithstanding that 96 percent of participating students had chosen to attend religious schools. *Id.* at 647, 663.

In addition to explaining *that* neutrality and private choice in individual-aid programs are dispositive for Establishment Clause purposes, the Court explained *why* they are dispositive and, therefore, why individual-aid programs with these characteristics are permissible even when certain forms of aid to religious *institutions* might not be. When "[a] program . . . shares these features," the Court noted, any "incidental advancement of a religious mission, or . . . perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government." *Id.* at 652. The Court later made the same point in simpler terms: "Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients." *Locke*, 540 U.S. at 719.

2. The Distinction Between Institutional-Aid And Individual-Aid Programs Matters Not Only To The Constitutionality Of *Including* Religious Options In School-Choice Programs, But Also To The Constitutionality Of *Barring* Religious Options From Them

The distinction between institutional- and individual-aid programs matters not only for purposes of determining whether religious options may be *included* in school-choice programs, but also in determining whether they may be *excluded*. If, after all, "the link between government funds and religio[n] . . . is broken" by private, individual choice, *id.*, then it is broken not only with respect to any Establishment Clause concerns in including religious options, but also with respect to any state anti-establishment interest in excluding them. And while school-choice opponents may insist that states have an interest in achieving *greater* separation than the Establishment Clause requires, the break in the link achieved by "genuine and independent private choice" is the *ultimate* separation. *Zelman*, 536 U.S. at 652. There is no greater separation in a chain than a break in its link.

Moreover, if, as this Court has held, neutrality and private choice are the necessary criteria for a permissible individual-aid program under the Establishment Clause, then the *absence* of those criteria – *i.e.*, a *lack* of neutrality, or a *denial* of private choice – is necessarily fatal under the Establishment Clause.

The neutrality and private choice requirements, after all, are relevant because of the Establishment Clause's mandate that a law not have "the forbidden 'effect' of advancing *or inhibiting* religion." *Id.* at 649 (emphasis added). If government's neutrality toward religion and provision for private, individual choice are necessary to protect against governmental *advancement* of religion, then government's banishment of religion, or its denial of private, individual choice, will necessarily "*inhibit[]* religion." *Id.* (emphasis added).

For evidence, one need only consider what happened in Maine when it excluded religious options from the school-choice program at issue in *Eulitt* and *Anderson*. Religious options had been permitted in the program for more than a century, but in 1980, they were barred. *Anderson*, 895 A.2d at 948. John Bapst High School – a Catholic school that had "enrolled the largest number of [participating] students attending a religious-affiliated high school" – was forced to close and re-open as a secular school, stripped of its Catholic identity, rather than see students who could not afford tuition denied the opportunity of an outstanding education. John Maddaus & Denise A. Mirochnik, *Town Tuitioning in Maine: Parental Choice of Secondary Schools in Rural Communities*, 8 J. Res. Rural Educ. 27, 32 (1992). The state's banishment of religious options undoubtedly had "the forbidden 'effect' of . . . inhibiting religion." *Zelman*, 536 U.S. at 649.

Thus, so long as this Court maintains a distinction between institutional and individual aid, and so long as the Establishment Clause protects against governmental inhibitions of religion as it does governmental advancements, states cannot constitutionally exclude religious options from school-choice programs.

3. The Lower Courts That Have Allowed Exclusion Of Religious Options From School-Choice Programs Have Overlooked, Or Flatly Ignored, The Implications Of The Institutional/Individual-Aid Distinction

Sadly, however, the distinction this Court has drawn between institutional and individual aid, and its significance for the constitutionality of excluding religious options from school-choice programs, has been lost on – even ignored by – lower courts that have found such exclusions permissible. So long as this Court maintains the distinction, it should make clear that it is a distinction with a difference.

A number of lower courts have mistakenly viewed the institutional/individual-aid distinction as a one-way street in this Court's Establishment Clause jurisprudence – as bearing only on the inclusion, but not exclusion, of religious options in individual-aid programs. In *Chittenden Town School District*, for example, the Vermont Supreme Court held that applying Vermont's "compelled support" clause to bar religious options in a school-choice program did not offend the federal Constitution. In so holding, it

recognized that this Court has drawn a distinction between institutional and individual aid, 738 A.2d at 549, and that, under *Witters* and *Mueller*, "the focus . . . has been the question of who receives or controls the expenditure of the public money – private individuals or the sectarian school." *Id.* at 564 (Johnson, J., concurring). But the court only considered this distinction in observing that, under the Establishment Clause, a state may include religious options in school-choice programs without impermissibly advancing religion. *See id.* at 549 (acknowledging that, under "federal law[,] . . . tuition payments to sectarian schools are constitutional as long as the schools are selected by the parents of the attending children"). It failed to consider the distinction's relevance in deciding whether a state may *exclude* religious options from such programs without *inhibiting* religion. The First Circuit likewise failed to consider the distinction's relevance in upholding Maine's wholesale exclusion of religious options from its school-choice program. *See Eulitt*, 386 F.3d at 353-57.

Worse, in *Doyle*, the institutional/individual-aid distinction was dismissed as "irrelevant" to the determination of whether excluding religious options from a school-choice program violates the Establishment Clause. There a three-justice plurality of the Colorado Supreme Court, in an outcome-determinative opinion, recognized that *Zelman* had distinguished between institutional- and individual-aid programs and that, for the latter, neutrality and private choice are the Establishment Clause's touchstones for the inclusion

of religious options. *Taxpayers for Pub. Educ.*, 351 P.3d at 473. But in holding that Colorado's Blaine Amendment requires their *exclusion*, and that excluding them does not violate the Establishment Clause, it dismissed the institutional/individual-aid distinction as "irrelevant." *Id.* at 473-74.

So long as this Court maintains its "consistent distinction" between institutional and individual aid, *Zelman*, 536 U.S. at 649, it should not allow lower courts to dismiss the distinction's significance. Accordingly, even if the Court declines to adopt a per se rule against religion-based exclusions in public-benefit programs, it should make clear, in this case or *Doyle*, that the institutional/individual-aid distinction matters and that such exclusions *are* prohibited in school-choice programs.

B. The State Constitutional Provisions Relied Upon To Bar Religious Options From School-Choice Programs Do Not Speak To Individual Aid And, Thus, Do Not Support An Anti-Establishment Interest In Excluding Religious Options

The institutional/individual-aid distinction is relevant to the federal constitutionality of religious exclusions in school-choice programs for another reason: the state constitutional provisions relied upon to justify such exclusions – namely, "Blaine Amendments" and "compelled support" clauses – do not even speak to individual aid. Therefore, they cannot support a state's

claimed anti-establishment interest in requiring the exclusion of religious options from such programs.

The most common state constitutional provisions relied upon by those who argue for the banishment of religious options from school-choice programs are state "Blaine Amendments." These provisions, the sordid history of which is discussed in Section II.C, below, were designed to do two things, both of which concerned institutions, rather than individuals: (1) preserve the overtly religious, nondenominationally Protestant nature of nineteenth-century public schools, while (2) prohibiting public funding of so-called "sectarian," or Catholic, institutions, particularly schools. *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting).

The text of the Blaine Amendment at issue in *Doyle*, for example – Article IX, section 7 of the Colorado Constitution – evinces this institutional focus. It prohibits payment of public funds "in aid of any *church* or sectarian *society*" or "to help support or sustain any *school, academy, seminary, college, university* or other literary or scientific *institution*, controlled by any church or sectarian denomination." (Emphasis added). The italicized objects of the provision's proscription are, without exception, institutions – specifically, churches and the educational institutions run by them. By proscribing aid to such institutions, the provision was designed to (1) allow religious instruction in public schools, which were *not* "controlled by any church or sectarian denomination," and (2) prohibit public funding of schools that *were* "controlled by a[ ] church or sectarian denomination," the

overwhelming majority of which were Catholic. The provision does not speak about aid to *individuals*, and for good reason: school-choice programs were practically non-existent when Colorado's Blaine Amendment was adopted.

The institutional focus is clear, as well, in the Missouri Constitution, which is at issue in the present case. The text of its primary Blaine Amendment, Article IX, section 8, proscribes public funding of any "school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination" – the same educational institutions targeted by Colorado's Blaine Amendment. Similarly, Article I, section 7, proscribes public funding "in aid of any church, sect or denomination of religion" – again, institutions. Although it also proscribes one specific form of *individual* aid – appropriations "in aid of any priest, preacher, minister or teacher" of a "church, sect or denomination of religion" – that is hardly surprising, as those individuals comprise the leadership of the institutions that are the provision's primary focus. As this Court observed in *Locke*, many states "placed in their constitutions formal prohibitions against using tax funds to support the ministry," and "*only* the ministry," because "religious training of clergy" is "of a different ilk." *Locke*, 540 U.S. at 722 n.5, 723.

The other state constitutional provisions relied upon by school-choice opponents in attempting to banish religious options from school-choice programs are "compelled support" clauses. But like Blaine

Amendments, these provisions, too, focus on aid to religious institutions – not individuals. The text of Vermont's compelled support clause, for example, evinces this focus on religious institutions and their leadership: "[N]o person . . . can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience." Vt. Const. ch. I, art. 3.

Such provisions were concerned with two common colonial-era practices: compulsory attendance at government-established churches and compulsory "taxes (commonly called tithes) in support of the churches and their ministers." Richard D. Komer, *School Choice and State Constitutions' Religion Clauses*, 3 J. Sch. Choice 331, 335 (2009); *see also id.* at 335. Compelled support clauses were designed to end these practices, and "the[ir] language is quite obviously aimed at avoiding the mandatory church attendance and compelled financial support that characterized the establishment of a particular religion as the official religion of the state." *Id.* at 336. They have nothing to say about public-benefit programs that aid individuals.

This is not to say that Blaine Amendments and compelled support clauses have not been stretched by some state courts to reach public-benefit programs that provide aid to individuals; they have. *E.g.*, *Taxpayers for Pub. Educ.*, 351 P.3d at 475 (holding Colorado's Blaine Amendment prohibited use of scholarships at religious schools); *Chittenden Town Sch. Dist.*, 738 A.2d at 562 (holding Vermont's compelled support

clause prohibited use of scholarships at religious schools). But whether, as a matter of state constitutional interpretation, these provisions reach that far is a separate question from whether, as a matter of federal constitutional jurisprudence, they can support a state's claimed anti-establishment interest in excluding religious options. In answering the second, federal question, it is the object of the provisions, as revealed by their text and history, that matters.[7]

The text and history of Blaine Amendments and compelled support clauses simply do not support a state's claimed anti-establishment interest in banishing religious options from school-choice programs. Their object was to ban public aid to certain religious institutions – not individuals. Thus, even if this Court concludes that these provisions provide states a sufficiently weighty justification for barring churches or other religious institutions from public-benefit

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[7] For example, in *Locke*, this Court recognized that the Washington Supreme Court had "authoritatively interpreted" its constitution "as prohibiting . . . [public] funding [of] religious instruction that will prepare students for the ministry." *Locke*, 540 U.S. at 719. But in considering whether Washington's anti-establishment interest was, for federal constitutional purposes, sufficiently important to justify barring such aid, the Court looked to the "plain text" of Framing-era state constitutions, as well Framing-era history. *Id.* at 722, 723. Only then did it conclude that Washington had an "historic and substantial state interest" in "not funding the religious training of clergy." *Id.* at 722 n.5, 724; *see also Lukumi*, 508 U.S. at 533, 535 (consulting text and operation of law to discern its object); *id.* at 542 (plurality) (consulting history for same purpose).

programs that, like the program in this case, aid institutions themselves, it should make clear that they do not justify barring religious options from school-choice programs, which aid individuals.

C. Extending Blaine Amendments To Bar Religious Options From Programs That Aid Individuals Extends The Anti-Catholic Animus Attending Their Enactment

There is another reason this Court should not allow Blaine Amendments specifically to justify the banishment of religious options from school-choice and other individual-aid programs: unlike compelled support clauses, which have the benign object of preventing state establishments of religion, Blaine Amendments were "born of bigotry" and "pervasive hostility to the Catholic Church." *Mitchell*, 530 U.S. at 828, 829 (plurality); *see also Zelman*, 536 U.S. at 721 (Breyer, J., dissenting) (noting anti-Catholicism "played a significant role" in the Blaine movement).

Although the history of these provisions is not part of the record in this case, it is a substantial part of the record in *Doyle*, and it is a disturbing history. As noted above, their target was the Catholic Church and the institutions, particularly schools, it operated. In fact, in *Mitchell*, a four-justice plurality of this Court called for Blaine's legacy to be "buried now." *Mitchell*, 530 U.S. at 829 (plurality). Now is, indeed, the time.

But even if this Court does not bury the Blaine Amendments completely, it should do the next best thing: hold that these provisions, which were designed to bar public funding of Catholic schools, cannot justify the exclusion of religious options from programs that fund students. Extending their reach to such programs, after all, is to extend the animus attending their enactment – something this Court should not countenance.

1. The Federal Blaine History Is Steeped In Anti-Catholic Animus

The history behind the Blaine Amendments dates to the early nineteenth century, when "reformers" advocating for the establishment of public schools sought to ensure those schools would be "non-sectarian." Although, today, "non-sectarian" is understood as "non-religious," the term meant something much different then.

Public school advocates believed moral education was an integral part of schooling and "should be based upon the common elements of Christianity." R. Freeman Butts, *The American Tradition in Religion and Education* 117 (1950). The early public schools therefore incorporated prayer and Bible reading in their curriculum. Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 Harv. J.L. & Pub. Pol'y 657, 666-68 (1998). The schools were overtly religious and practiced a generic, non-denominational Protestantism.

Invariably, it was the King James, or Protestant, version of the Bible that was read and Protestant versions of prayers that were recited. *Id.*

Creation of the early public schools, however, coincided with the arrival of increasingly non-Protestant, especially Catholic, immigrants. Unsurprisingly, these new citizens objected to the compulsory education of their children in Protestant public schools, and many Catholic students were beaten or expelled for refusing to partake in Protestant exercises.

For example, in 1853, Bridget Donahoe was expelled from her public school in Ellsworth, Maine, because she refused to read from the King James Bible. *Donahoe v. Richards*, 38 Me. 379, 391, 398 (1854). Bridget filed a lawsuit challenging her expulsion, triggering an anti-Catholic backlash that led to the burning of Ellsworth's two Catholic churches. *See* Brian Doyle, *The Ellsworth Incident*, Boston College Magazine 50, 53, 55 (Summer 1991).

In 1854, Maine's high court upheld Bridget's expulsion in an opinion dripping with nativism. It spoke of the "[l]arge masses of foreign population . . . among us, weak in the midst of our strength," who must be "assimilate[ed] . . . through the medium of the public schools." *Donahoe*, 38 Me. at 413. Shortly thereafter, Father John Bapst – who had counseled Bridget against participating in the Protestant exercises and for whom the Maine high school discussed in section II.A.2, above, was later named – was attacked by a mob while hearing confessions and carried away

to Ellsworth's shipyard, where he was tarred and feathered. Doyle, *supra*, at 55.

The Bridget Donahoe incident was hardly anomalous. In 1859, a Massachusetts court dismissed the prosecution of a public school teacher who beat a Catholic student, Tom Wall, for not participating in the school's Protestant exercises. *Commonwealth v. Cooke*, 7 Am. L. Reg. 417 (Boston Police Ct. 1859). And a grand jury declined to indict a public school teacher in Shirley, Massachusetts, after he severely beat John and Mary Hehir for refusing to read from the King James Bible. When their mother complained to the teacher, he beat them again in her presence. Joan DelFattore, *The Fourth R* 49 (2004).

When Catholics' efforts to obtain better treatment in public schools failed, they began opposing tax levies to support the schools and, later, organizing their own schools and seeking a share of public funds. Viteritti, *supra*, at 669. This upset the Protestant majority, and a virulent anti-Catholicism erupted. It engendered the nativist Know-Nothing party, which gained prominence – and political dominance – in a number of states in the mid-nineteenth century. The Know Nothings and those inspired by them convinced electorates in several states to adopt laws or constitutional provisions barring public funding of so-called "sectarian" schools. *Id.*; Lloyd Jorgenson, *The State and the Non-Public School: 1825-1925* 100 (1987). "[T]he Protestant position . . . was that public schools must be 'nonsectarian' (which was usually understood to allow Bible reading and other

Protestant observances) and public money must not support 'sectarian' schools (which in practical terms meant Catholic)." *Zelman*, 536 U.S. at 721 (Breyer, J., dissenting) (internal quotation marks omitted) (quoting John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 301 (2001)).

This anti-Catholic bigotry metastasized after the Civil War. In the mid-1870s, Republicans – plagued with Grant administration scandals, a recent loss of the House of Representatives, and public wariness over their signature issue, Reconstruction – sought a new campaign issue. They found it in the supposed Catholic threat to the public school. *See* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 Am. J. Legal Hist. 38, 48-49 (1992).

In September 1875, President Grant delivered a widely-publicized speech warning of a new civil war based not on race, but on religion. It would pit, he predicted, "patriotism" and "intelligence" against "superstition" and "ignorance." *The President's Speech at Des Moines*, The Republic, Nov. 1875, at 324. According to Grant, only the public school – "the promoter of that intelligence which is to preserve us as a free nation" – could prevent such conflict. *Id.* He urged the nation to "[e]ncourage free schools, and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the support of any sectarian school." *Id.*

That December, Grant pressed Congress to adopt a constitutional amendment to do just that. Representative James Blaine took up the charge. Within days, he introduced an amendment to the United States Constitution to prohibit public funding of so-called sectarian schools. Viteritti, *supra*, at 670-72.

Blaine's amendment was a "transparent political gesture against the Catholic Church." *Id.* at 671. The term "sectarian" was widely understood as "Catholic," and even Blaine's sympathizers acknowledged the amendment was "directed against the Catholics" and would be used "to catch anti-Catholic votes." The Nation, Mar. 16, 1876, at 173.

Blaine's amendment passed overwhelmingly in the House but fortunately fell just shy of the supermajority needed in the Senate to proceed to the states for ratification. *Mitchell* summarized the sordid history leading up to the vote:

> Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic."

530 U.S. at 828 (plurality).

2. State Blaine History Is Likewise Steeped In Anti-Catholic Animus

Although Blaine's amendment failed, the matter did not die there. His sympathizers subsequently achieved through the back door what they could not achieve through the front: as new states entered the Union, Congress, through the enabling legislation facilitating their entry, required them to include Blaine-type provisions in their own constitutions. Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 Fordham L. Rev. 493, 513-14 (2003).

Even states that were not required to include Blaine provisions commonly did so, and for the same discriminatory reasons that animated the federal amendment. Colorado was one such state. Its constitutional convention commenced just six days after Blaine proposed his federal amendment and, thus, before Congress had begun mandating inclusion of Blaine language in state constitutions. The history of its Blaine Amendment is, like the history of the federal amendment, part of the record in *Doyle* and similarly steeped in anti-Catholic animus.

Numerous proposals were made at the convention's outset to prohibit public funding of so-called "sectarian" schools. *E.g.*, *Proceedings of the Constitutional Convention Held in Denver* 112-13, 185-86 (Smith-Brooks Press 1907). For example, former territorial governor John Evans petitioned on behalf of eleven Protestant churches for provisions to keep

public schools "free from sectarian" influence, prohibit diversion of funds to Catholic schools, and allow Bible reading in public schools. *Id.* at 112-13.

These proposals were championed in the media. For example, a *Rocky Mountain News* article warned that the "'antagonism of a certain church towards our American public school system,'" if left unchecked, would "'lay our vigorous young republic . . . bound with the iron fetters of superstition at the feet of a foreign despot.'" Charles L. Glenn, *The American Model of State and School* 171 (2012). And a *Boulder County News* editorial asked, in a tone religiously and racially charged, "'[I]s it not enough that Rome dominates in Mexico and all of South America?'" *Id.* at 172.

Governor Evans summarized the convention's atmosphere as "'much like the Know Nothing movement,'" with "'Republicans . . . going into secret societies against the Catholics.'" Like Blaine, he was happy to exploit the situation: "'I keep my hand covered while I stir them up.'" *Id.* at 171.

The delegates ultimately included Blaine language, and the *Rocky Mountain News* celebrated, explaining that "'far more protestants can be got to vote for the constitution on account of this very clause than catholics for the same reason to vote against it.'" *Glenn*, *supra*, at 73. It was right: the people ratified the constitution overwhelmingly, "'voting up,'" as a *Boulder County News* piece put it, what "'the Pope of Rome . . . [had] ordered voted down.'" Donald W.

Hensel, *Religion and the Writing of the Colorado Constitution*, 30 Church Hist. 349, 356 (1961) (alteration and omission in original).

3. This Court Should Not Countenance Extensions Of The Animus That Engendered Blaine Amendments

The national and state-level history of the Blaine movement lays bare the twin objects of the state constitutional provisions it engendered: (1) preservation of Protestantism in nineteenth-century public schools; and (2) prohibition of public funding of Catholic schools. Their history, like their text, demonstrates that they were not designed to reach programs that aid *students*. Yet that is how some courts, including the three-justice plurality in *Doyle*, are interpreting them today.

Although it is the purview of state courts to interpret and apply provisions of their own state constitutions, it is not their purview to interpret and apply them in a way that conflicts with the federal Constitution's command that states not inhibit religion. When state courts apply Blaine Amendments to programs that aid students, rather than institutions, they are, indeed, inhibiting religion. They are perpetuating the animus against a particular religion – Catholicism – that underlies the provisions, and in extending the provisions to bar families from choosing *any* religious schools, they are also transmuting these engines of discrimination against Catholicism

into engines of discrimination against religion in general. This Court should not allow it.

D. *Locke v. Davey* Does Not Authorize The Exclusion Of Religious Options From School-Choice Programs

Courts that rely on Blaine Amendments and compelled support clauses to exclude religious options from school-choice programs commonly invoke this Court's opinion in *Locke* as giving them federal constitutional license to do so. *Locke* gives no such thing. If anything, it indicates that such exclusions are *not* permissible: "The opinion . . . suggests, even if it does not hold, that the State's latitude to discriminate against religion is confined to certain 'historic and substantial state interest[s]' and does not extend to the wholesale exclusion of religious institutions and their students from otherwise neutral and generally available government support." *Colo. Christian Univ.*, 534 F.3d at 1255 (citation omitted) (alteration in original) (quoting *Locke*, 540 U.S. at 725).

To be sure, *Locke* upheld a religion-based exclusion from an individual-aid program: the exclusion of students majoring in "devotional theology" from a postsecondary scholarship program. *Locke*, 540 U.S. at 715. In that sense, the program was not neutral toward religion. But the program *was* neutral toward religion as that term was used in *Mueller*, *Witters*, *Zobrest*, and *Zelman*: it afforded students the choice of attending a religious or non-religious school with

their scholarships. *Id.* at 716. Indeed, this Court stressed how the program went "a long way toward including religion in its benefits" by, among other things, "permit[ting] students to attend pervasively religious schools." *Id.* at 724. The narrow exclusion that the Court allowed was hardly the complete *banishment* of religious options that some courts claim *Locke* authorized.

"[T]he only [governmental] interest at issue" in *Locke*, moreover, was "the State's interest in not funding the religious training of clergy." *Id.* at 722 n.5. That interest is not implicated by religious options in elementary and secondary school-choice programs. And the very reason this Court stressed that that was the "only" interest at issue in *Locke* was to assuage Justice Scalia's concern that the Court's opinion might be viewed as "ha[ving] no logical limit" and as "justify[ing] the singling out of religion for exclusion from public programs in virtually any context." *Id.* at 730 (Scalia, J., dissenting). "Nothing in our opinion suggests" such a reading, the Court emphasized. *Id.* at 722 n.5. Yet that is the reading some courts have adopted. *E.g.*, *Taxpayers for Pub. Educ.*, 351 P.3d at 474 (plurality) (reading *Locke* as authorizing "state constitutions [to] draw a tighter net around the conferral of" aid to students – a net "far more restrictive than the Establishment Clause"); *Eulitt*, 386 F.3d at 355 (reading *Locke* "broadly" and rejecting argument that the "'play in the joints' identified by [*Locke*] is applicable to certain education funding decisions but not others").

What's more, *Locke* did not, according to the Court, involve a Blaine Amendment. *Locke*, 540 U.S. at 723 n.7.[8] The Court acknowledged that the Washington Constitution *contains* a Blaine Amendment and recognized the possibility that it is "linked with anti-Catholicism," but that provision was not at issue in the case. *Id.* Blaine Amendments, however, *are* commonly relied upon by those who argue that religious options must be barred from school-choice programs, and it was a Blaine Amendment that was relied upon in *Doyle* to bar religious options from the school-choice program at issue there. Thus, the history of these provisions, which was "simply not before" the Court in *Locke*, *id.*, *is* relevant in school-choice cases.

Finally, the "devotional theology" exclusion in *Locke* "d[id] not require students to choose between their religious beliefs and receiving a government benefit," because a student could pursue a devotional theology degree with his own money and "still use [his] scholarship to pursue a secular degree at a different institution." *Id.* at 720-21 & n.4. But barring religious options from school-choice programs *does* require students and their parents to choose between their religious beliefs and receipt of a government

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[8] *But see* Mark Edward DeForrest, Locke v. Davey: *The Connection Between the Federal Blaine Amendment and Article I, § 11 of the Washington State Constitution*, 40 Tulsa L. Rev. 295 (2004).

benefit. A third-grader, after all, cannot spend eight hours a day at a religious school on her parents' dime, then head off for a second course of study at a non-religious private school with a scholarship that evening. Nor could a child spend thirteen years (and her parents' money) on elementary and secondary education at a religious school, followed by another thirteen years on elementary and secondary education at a non-religious school with a scholarship.

In short, those who rely on *Locke* to expunge religious options from school-choice programs take the opinion for precisely what this Court said it was not: "without limit." *Id.* at 722 n.5. This Court should not let them continue taking liberties with its opinion.

III. Allowing States To Discriminate Against Religious Options In School-Choice Programs Would Be Devastating

Finally, the consequences of concluding that states may, consistent with the federal Constitution, bar religious options from school-choice programs would be devastating to the hundreds of thousands of students throughout the country who desperately need the educational alternatives that school choice provides. As noted above, 61 school-choice programs currently provide critical opportunities to approximately 1.3 million kindergarten-through-twelfth-grade students. A decision from this Court that allows

Blaine Amendments and other state constitutional provisions to be used to deny these children the choice of a religious school, even when it is the school their parents believe is best for them, would put their educational futures in peril. It would also substantially undermine the ability of legislators to use school choice to provide greater educational opportunity to future students.

Compounding the direness of that scenario is the fact that an overwhelming number of students participating in school-choice programs are highly vulnerable children with unique educational needs. In fact, school-choice programs are often targeted toward such students, including children from low-income families and children with disabilities.

Indiana's Choice Scholarship Program, for example, which is the largest elementary and secondary scholarship program in the nation by student participation, is designed for students of families earning less than 150 percent of the income level for federal free-and-reduced lunch. *See* Friedman Found. for Educ. Choice, *The ABCs of School Choice* 41 (2016 ed.).[9] The nation's second largest program, Florida's McKay Scholarship Program, was created for students with disabilities. *See id.* at 27. And the third largest, the Milwaukee Parental Choice Program,

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[9] Families of students with disabilities may earn 200 percent of the free-and-reduced lunch level.

serves students whose families earn less than three times the federal poverty level. *See id.* at 115.

School-choice programs, moreover, are often adopted to provide alternatives to students trapped in failing public schools. The program this Court upheld in *Zelman*, for example, was enacted to "provid[e] educational assistance to poor children in a demonstrably failing public school system." *Zelman*, 536 U.S. at 649. Similarly, the purpose of the Milwaukee Parental Choice Program "is to provide low-income parents with an opportunity to have their children educated outside of the embattled Milwaukee Public School system." *Jackson v. Benson*, 578 N.W.2d 602, 612 (Wis. 1998). And Congress enacted the D.C. Opportunity Scholarship Program to provide alternatives to students in the District of Columbia, where "only 10 percent of . . . fourth-graders could read proficiently" and, "[a]t the 8th-grade level, [only] 12 percent were proficient." Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, div. C, tit. III, § 302(3), 118 Stat. 3.

Sadly, as Justice Thomas noted in *Zelman*, these "failing urban public schools disproportionately affect minority children." *Zelman*, 536 U.S. at 681 (Thomas, J., concurring). For example, a congressionally-mandated study found that over 90 percent of students offered a scholarship under the D.C. Opportunity Scholarship Program were African-American. Patrick Wolf, *et al.*, U.S. Dep't of Educ., *Evaluation of the DC Opportunity Scholarship Program: First Year Report on Participation* 49 (April 2005). And an evaluation of the

Milwaukee Parental Choice Program similarly found that 62.4 percent of participating students were African-American, while 13.2 percent were Hispanic. Wis. Legis. Audit Bureau, *An Evaluation, Milwaukee Parental Choice Program*, No. 00-2, at 37 (Feb. 2000).

School-choice programs are an important "means of raising the quality of education provided to [these] underprivileged urban children," who are "most in need of educational opportunity." *Zelman*, 536 U.S. at 681, 683 (Thomas, J., concurring). This Court should not allow the educational opportunities that school choice is currently providing them to be placed in jeopardy.

CONCLUSION

This Court should reverse the judgment of the Eighth Circuit and hold that religion-based exclusions in public-benefit programs – whether they provide institutional or individual aid – violate the federal Constitution. If it so holds, then the Court should also grant the petition in *Doyle*, No. 15-556, vacate the judgment of the Colorado Supreme Court, and remand the case to that court for further consideration.

If, however, this Court holds that religion-based exclusions are permissible, it should limit its holding to the institutional-aid context and clarify that such exclusions are *not* permissible in school-choice and other individual-aid programs. Alternatively, it should

grant the petition in *Doyle* to resolve that issue – an issue *Doyle* squarely presents.

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